Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

No. 92-669

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILLIAM E. SMITH, *Petitioner*,

v.

STATE OF INDIANA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

LINLEY E. PEARSON
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Counsel of Record

ARTHUR THADDEUS PERRY
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, IN 46204-2794
Telephone: (317) 232-6222

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the allegation that the Court of Appeals and the Supreme Court of Indiana erred in applying the "required records" doctrine, which holds that the production of business and tax records required to be kept by law is not protected by Fifth Amendment privilege, to the facts of this case presents a significant federal question.

TABLE OF CONTENTS

Page:

Question Presented for Review i

Table of Authorities iii

Summary of the Argument 1

Argument:

THIS CASE FAILS TO PRESENT A SIGNIFICANT FEDERAL QUESTION. . . . 1

Conclusion 3

TABLE OF AUTHORITIES

Cases:	*Page:*
California v. Byers, 402 U.S. 424 (1971)	2
Grosso v. United States, 390 U.S. 62 (1968). . . .	2
In re Two Grand Jury Subpoenae, 793 F.2nd 69 (2nd. Cir. 1986).	3
Shapiro v. United States, 335 U.S. 1 (1948)	1
Siegel v. New Jersey Division of Taxation, 506 A.2nd 776 (N.J. Super. 1986), *cert. denied*, 523 A.2nd 199	3
State v. Stroger, 478 A. 2nd 1175 (N.J. 1984). . .	3
State of South Dakota v. Reif, 478 N.W.2nd 815	3
Stone v. Powell, 428 U.S. 465 (1976)	2
United States v. Doe, 465 U.S. 605 (1984)	2,3
United States v. Dichne, 612 F.2nd 632 (2nd Cir. 1979), *cert. denied*, 445 U.S. 928 (1980)	2
Williams v. Withrow, 944 F.2nd 292 (6th Cir. 1991), *cert. granted sub nom. Withrow v. Williams*, _ U.S. _, 112 S.Ct. 1664 (1992).	2

SUMMARY OF ARGUMENT

Petitioner raises no significant question of law, but merely seeks to have this Court act as a court of error to correct an alleged erroneous application of existing law by the Court of Appeals and the Supreme Court of Indiana. Such a claim is properly cognizable in federal habeas corpus proceedings and does not merit review by this Court. On the merits, the Indiana Court of Appeals was correct in holding that the Petitioner did not have a valid claim of Fifth Amendment privilege as to tax records required by law to be kept.

ARGUMENT

THIS CASE FAILS TO PRESENT A SIGNIFICANT FEDERAL QUESTION

Petitioner was convicted of failure to permit examination of records. The Indiana Court of Appeals held that the records in question were records required by law to be kept, and were therefore not subject to Petitioner's claim of Fifth Amendment privilege.

The Indiana Court of Appeals relied on the "required records" doctrine. *Shapiro v. United States*, 335 U.S. 1 (1948). Petitioner's claim is not that the doctrine is bad law, but simply that the Indiana court erred in its application to the facts of this case. Petitioner does not assert any conflict in the circuits, or between state court decisions and the circuits, or state court decisions and this court. Thus Petitioner essentially seeks to have this Court act as a court of error to review an alleged erroneous application of existing law by the Courts of Indiana. Such a function is more appropriately performed by the District Courts and the Circuit Courts of Appeal in federal habeas proceedings.

Respondent is aware that this Court has recently granted certiorari in *Withrow v. Williams*, __ U.S. __, 112 S.Ct. 1664, to review the Sixth Circuit's rejection of a claim that the issue of custodial interrogation with respect to *Miranda* warnings is not an appropriate subject for collateral review, *Williams v. Withrow*, 944 F.2nd 291 (6th Cir. 1991). Even if the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976), however, should be extended to *Miranda* claims, the Fifth Amendment claim here would still be cognizable in habeas corpus proceedings, involving as it does no question of *Miranda* warnings or custodial interrogation. Since Petitioner has raised no legal question meriting the exercise of this Court's discretionary jurisdiction, such as, *e.g.*, a conflicting interpretation of the law among the circuits, or between the highest court of a State and the federal circuits, he has failed to present a significant federal question to this Court. The appropriate course of action would be to relegate Petitioner to his habeas remedy for his assertion of error by the Court of Appeals and the Supreme Court of Indiana.

On the merits, the Indiana Courts were correct. Petitioner does not dispute that the records in question were required by law to be kept. They were the type all taxpayers are required to maintain; they were not targeted at a selected group inherently suspected of criminal activity. *California v. Byers*, 402 U.S. 424 (1971); *Grosso v. United States*, 390 U.S. 62 (1968); *United States v. Dichne*, 612 F.2nd 632 (2nd Cir. 1979), *cert. denied* 445 U.S. 928 (1980).

United States v. Doe, 465 U.S. 605 (1984), relied on by Petitioner for the notion that producing records is testimonial and protected by the Fifth Amendment, is not applicable. *Doe* noted in a footnote that it concerned only business documents and records not required by law to be kept or disclosed to a

public agency. 465 U.S. at 607, fn. 3. See the discussion in *In re Two Grand Jury Subpoenae*, 793 F.2nd 69 (2nd Cir. 1986), distinguishing *Doe*. The State Courts agree. *Siegel v. New Jersey Division of Taxation*, 506 A.2nd 776 (N.J. Super. 1986), *cert. denied* 523 A.2nd 199; *State v. Stroger*, 478 A.2nd 815 (N.J. 1984); *State of South Dakota v. Reif*, 478 N.W.2nd 815 (S.D. 1991).

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Counsel of Record

ARTHUR THADDEUS PERRY
Deputy Attorney General

Attorneys for Respondent